BRB No. 07-0784

R.E.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY	)	DATE ISSUED: 03/31/20082008
	)	
Self-Insured Employer-Respondent	)	

DECISION and ORDER

Appeal of the Decision and Order of Daniel A. Sarno, Jr., Administrative Law Judge, United States Department of Labor.

Charlene A. Morring (Montagna Klein Camden L.L.P.), Norfolk, Virginia, for claimant.

Benjamin M. Mason (Mason, Mason, Walker & Hedrick, P.C.), Newport News, Virginia, for self-insured employer.

Before: DOLDER, Chief Administrative Appeals Judge, HALL and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (2007-LHC-00066) of Administrative Law Judge Daniel A. Sarno, Jr., rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq*. (the Act). We must affirm the administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant began working for employer in 1976 and testified that he has been exposed to loud noise during the course of his employment. Claimant underwent yearly audiograms administered by employer as part of its hearing conservation program. CX 3; EX 1. Claimant filed a claim for a 15.6 percent bilateral hearing loss based on the

audiometric evaluation administered on August 30, 2006. Employer controverted the claim on the basis that claimant's hearing loss is not work-related.

In his decision, the administrative law judge found claimant entitled to the Section 20(a) presumption, 33 U.S.C. §920(a), linking his 15.6 percent binaural hearing loss to his employment and that employer produced substantial evidence to rebut the presumption. Weighing the evidence as a whole, the administrative law judge credited the opinion of employer's expert, Dr. Zambas, over that of claimant's expert, Dr. Lassen, an otolaryngologist, to find that claimant's current hearing loss is not related to his employment. Accordingly, the administrative law judge denied claimant's claim for compensation.

On appeal, claimant challenges the administrative law judge's finding that employer rebutted the Section 20(a) presumption and his weighing of the evidence as a whole. Employer responds, urging affirmance of the administrative law judge's denial of compensation benefits.

Section 20(a) of the Act, 33 U.S.C. §920(a), provides claimant with a presumption that his disabling condition is causally related to his employment if he establishes that he suffered a harm and that employment conditions existed which could have caused the harm. *See Burley v. Tidewater Temps, Inc.*, 35 BRBS 185 (2002). Once, as here, the Section 20(a) presumption is invoked, it is employer's burden to rebut it with substantial evidence that there is no causal connection between claimant's injury and his employment. *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997). If the administrative law judge finds that the Section 20(a) presumption is rebutted, he must weigh all of the evidence in the record, and resolve the causation issue based on the record as a whole, with claimant bearing the burden of persuasion. *Id.; see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 257, 28 BRBS 43(CRT) (1994).

Claimant first contends the administrative law judge erred in finding the opinion of Dr. Zambas sufficient to rebut the Section 20(a) presumption.[1] We reject this

[1] Claimant argues that Dr. Zambas' testimony is biased because he is employed by employer, and speculative as, although he testified that literature supports his claim that a middle ear infection can cause a noise-induced pattern, he did not identify the literature. Cl. Br. on App. at 8. Claimant also notes that Dr. Zambas testified that "variables" can cause an infection to resemble a noise-induced pattern, without even "remotely" identifying the variables. *Id.* These contentions are more appropriately addressed when the evidence is weighed as a whole, as, at rebuttal, employer's burden is one of production and not persuasion. *See generally American Grain Trimmers v. Director, OWCP [Janich]*, 181 F.3d 810, 33 BRBS 71(CRT)(7th Cir. 1999)(*en banc*), *cert. denied,*

contention. The administrative law judge relied on Dr. Zambas's hearing testimony that claimant has "not suffered any cumulative hearing loss as a consequence of noise exposure." Tr. at 46, 56. Dr. Zambas stated that claimant's current hearing loss is due to a permanent nerve hearing loss, which developed prior to his employment, and claimant's recurring middle ear infections. Decision and Order at 16. We affirm the administrative law judge's finding that the Section 20(a) presumption is rebutted as Dr. Zambas's testimony constitutes substantial evidence that claimant's hearing loss is not related to his employment. *Coffey v. Marine Terminals Corp.*, 34 BRBS 85 (2000); *see generally Arrar v. St. Louis Shipbuilding Co.*, 837 F.2d 334, 20 BRBS 79(CRT) (8th Cir. 1988).

Claimant also challenges the administrative law judge's finding that claimant's hearing loss is not work-related, based on his weighing of the evidence as a whole. Claimant contends the administrative law judge erred in giving greater weight to the opinion of Dr. Zambas than to that of Dr. Lassen.

The administrative law judge gave greater weight to the opinion of Dr. Zambas that claimant's hearing loss is not work-related because his opinion is based on a review of all of claimant's 30 audiograms and on his periodic examinations of claimant since April 2000. The administrative law judge found persuasive Dr. Zambas's explanation that the decrease in claimant's hearing function commenced in 2000 when claimant's problems with middle ear infections and eustachian tube dysfunction began. Claimant's chronic condition necessitated the insertion of tubes into his ears in April 2006. Dr. Zambas stated that claimant had a nerve conduction loss prior to his commencement of employment with employer, and, in view of his chronic infections and the asymmetry of his hearing loss, claimant's condition has not been worsened by noise exposure. EXs 1, 2; Tr. at 35-50, 56-58, 73-74.

In contrast, the administrative law judge gave less weight to Dr. Lassen's January 2007 opinion that noise could have played a role in claimant's hearing loss, as Dr. Lassen had not reviewed all of claimant's audiometric results.[2] EXs 1, 7. Moreover, the administrative law judge noted the equivocal nature of this opinion. Decision and Order at 17-18. At his deposition, Dr. Lassen was shown the results of all of claimant's audiograms, EX 3 at 15, and opined that they demonstrated a "classic noise-induced pattern," *id.* at 17, a statement with which Dr. Zambas disagreed. Tr. at 65, 72.

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527 U.S. 1187 (2000); *Damiano v. Global Terminal & Container Serv.*, 32 BRBS 261 (1998); *see* discussion *infra*.

[2] Dr. Lassen examined claimant on only one occasion for chronic ear drainage and not because of a loss of hearing. EX 3 at 7.

The administrative law judge found that Dr. Zambas's opinion is better reasoned and more consistent with the audiometric results. The administrative law judge is entitled to determine the weight to be accorded to the evidence of record, *Calback v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961); *see also Duhagon v. Metropolitan Stevedore Co.*, 169 F.3d 615, 33 BRBS 1(CRT) (9th Cir. 1999), and Dr. Zambas's opinion constitutes substantial evidence supporting the administrative law judge's conclusion that claimant's hearing loss is not related to his employment. Claimant has not demonstrated bias on Dr. Zambas's part merely because he is employed by employer as the administrative law judge had the opportunity to assess his credibility at the hearing. *See Reid v. George Hyman Constr. Co.*, 13 BRBS 408, 409 n.1 (1981). In addition, the administrative law judge was entitled to rely on Dr. Zambas's testimony concerning "literature" supporting his opinion, Tr. at 67, as claimant did not offer any evidence undermining this testimony. To the extent that claimant seeks a re-weighing of the evidence, such is beyond the Board's scope of review. *Burns v. Director, OWCP*, 41 F.3d 1555, 29 BRBS 28(CRT) (D.C. Cir. 1994). As the administrative law judge's finding that claimant's hearing loss is not work-related is supported by substantial evidence, we affirm the denial of benefits.

Accordingly, we affirm the administrative law judge's Decision and Order denying benefits.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge